

Justin E. Sterling, State Bar No. 249491
LAW OFFICES OF JUSTIN STERLING
Justin@SterlingDefense.com
15760 Ventura Blvd. Suite 700
Encino, CA 91436
Tel. (818) 995-9452/Fax. (818) 824-3533.

Erin Darling, State Bar No. 259724
LAW OFFICES OF ERIN DARLING
Erin@ErinDarlingLaw.com
3435 Wilshire Blvd. Suite 2910
Los Angeles, CA 90010
Tel. (323) 736-2230

Attorneys for Plaintiff Dora Solares

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DORA SOLARES, an individual,

Case No. 1:20-cv-00323-NONE-BAM

Plaintiff,

V.

RALPH DIAZ, in his individual capacity, KENNETH CLARK, in his individual capacity, JOSEPH BURNS, in his individual, and DOES 1 TO 15, in their individual capacities

OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS

Judge: Hon. Dale A. Drozd

Defendants.

Plaintiff Dora Solares, on behalf of herself and as successor-in-interest to her son, Luis Romero (“Decedent”) hereby files her Objections to the Magistrate Judge’s Findings and Recommendations Regarding Defendants’ Motion to Dismiss First Amended Complaint Findings and Recommendations. (Dkt. No. 36)

Respectfully submitted,

Dated: August 26, 2021

LAW OFFICES OF ERIN DARLING

By: /s/ *Erin Darling*

Erin Darling,

Attorney for Plaintiff

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1 **I. INTRODUCTION**

2 As described herein, Plaintiff objects to the Magistrate Judge's Findings and
3 Recommendations Regarding Defendants' Motion to Dismiss First Amended Complaint
4 Findings and Recommendations. (Dkt. No. 36, hereinafter referred to as "Findings and
5 Recommendations"). In particular, the Plaintiff objects to the finding that the First
6 Amended Compliant ("FAC") (Dkt. No. 15) contains merely conclusory allegations that
7 do not support individual § 1983 claims against Defendants Clark, Burns and Does 1-15,
8 and therefore does not support a supervisory liability claim, a loss of familial relations claim,
9 and that since there are no federal claims, the Court should not exercise supplemental
10 jurisdiction over state claims. Additionally, Plaintiff objects to the finding that Decedent's
11 father is a necessary party and can feasibly be joined. Plaintiff objects that the FAC should
12 be dismissed and requests that Defendants be held to answer. Last, Plaintiff would call the
13 Court's attention to additional claims that arise from facts learned since the filing of the
14 FAC, namely, that gruesome photographs of Decedent's mutilated body were published
15 online, and Plaintiff requests to file a Supplemental Pleading pursuant to Fed. R. Civ. P.
16 15(d) to bring a claim pursuant to Cal. Penal Code §§ 647.9, which was enacted in 2020.

17 **II. THE FAC ADEQUATELY STATES CLAIMS AGAINST CLARK AND
18 BURNS**

19 Federal courts may not apply "heightened pleading" to § 1983 claims. *Leatherman v.*
20 *Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). The Supreme court
21 in *Bell Atl. Corp. v. Twombly* affirmed that, "we do not apply any 'heightened' pleading
22 standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which
23 can only be accomplished 'by the process of amending the Federal Rules, and not by judicial
24 interpretation,' [internal citations omitted.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569, n.
25 14 (2007). Some courts questioned *Leatherman* following the Supreme Court's decisions in
26 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678
27 (2009). See, e.g., *Mayfield v. Cnty. of Merced*, No. 1:13-cv-01619-LJO, 2014 WL 5822913, at *2
28

1 n.3 (E.D. Cal. Nov. 10, 2014). However, the Supreme Court subsequently affirmed the
2 *Leatherman* notice-pleading rule in *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2010).¹

3 **A. Conditions of Confinement and Failure to Protect Claims**

4 The Findings and Recommendations states: “Plaintiff does not allege factual support
5 that either Defendant Burns or Clark knew of the incidents or records referenced when they
6 placed Decedent in a cell with Osuna, failed to ensure routine cell-checks were conducted,
7 or failed to enforce rules against bedsheets preventing visibility into cells.” (Dkt. 36 at 7) As
8 described below, the FAC does adequately allege that Defendants Burns and Clark: (1) knew
9 of incidents and records when they placed Decedent in Osuna’s cell; (2) failed to ensure
10 routine cell-checks were conducted and did not enforce rules against preventing visibility
11 into cells.

12 **1. The FAC alleges that Defendants Burns and Clark Knew of
13 Incidents Involving Osuna and Had Been Segregated from Other
14 Inmates**

15 The Findings and Recommendations states that “Plaintiff fails to allege facts showing
16 that Defendants Burns or Clark knew that Decedent was at a substantial risk of serious
17 harm, and that they disregarded that risk. Rather, Plaintiff sets forth generalized and
18 conclusory allegations that Defendants were ‘on notice’ that Osuna should not be double-
19 celled, which are insufficient to state a cognizable claim under the Eighth Amendment. (*Id.*
20 at 12–13.)”

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22 ¹ The Court in *Johnson* stated: “Federal pleading rules call for a ‘short and plain statement of
23 the claim showing that the pleader is entitled to relief,’ Fed. Rule. Civ. Proc. 8(a)(2); they do
24 not countenance dismissal of a complaint for imperfect statements of the legal theory
25 supporting the claim asserted. See Advisory Committee Report of October 1955, reprinted
26 in 12A C. Wright, A. Miller, M. Kane, R. Markus, & A. Steinman *Federal Practice and
27 Procedure* 644 (2014) (Federal Rules of Civil Procedure ‘are designed to discourage battles
28 over mere form of statements’); 5 C. Wright & A. Miller, *Federal Practice and Procedure* §
1215, p. 172 (3d ed. 2004) (Rule 8(a)(2) ‘indicates that a basic objective of the rules is to
avoid civil cases turning on technicalities’). In particular, no heightened pleading rule requires
plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly
in order to state a claim. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination
Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993).”

1 Plaintiff respectfully disagrees. Plaintiff's allegations regarding defendants Clark and
2 Burns are not conclusory and specifically allege how each man was on notice.

3 First, the FAC sets forth specific allegations as to how Burns and Clark were on
4 notice. Paragraph 15 of the FAC, starts with a sentence, "Burns, Clark and Diaz, were on
5 notice that Jaime Osuna posed a threat to other inmates and should not share a cell with
6 anyone," (Dkt. 15 at 6, ll. 1-2). The remaining portion of Paragraph 15 then describes the
7 particular details about how Burns, Clark and Diaz were on notice: "jail and prison reports"
8 warning of Osuna's "propensity for extreme violence, insatiable desire to kill, and need to
9 be held in a psychiatric ward, not in a prison with other inmates," (*id.* at 6, ll. 7-8); "Osuna's
10 violent behavior while incarcerated at the Kern County Jail awaiting trial in his original
11 murder case, including one incident that resulted in Osuna being charged with attempted
12 murder," (*id.* at 6, ll. 9-11); "Osuna was serving a no-parole sentence for torture killing of a
13 Bakersfield woman in 2011," (*id.* at 6, ll. 12-13); "Osuna posed a danger to anyone he shared
14 a cell, which is why he had never had a cell-mate at Corcoran before." *Id.* at 6, ll. 13-14.
15 Rather than state general allegations, Paragraph 15 describes the incidents of which
16 Defendants Burns, Clark and Diaz were on notice.

17 Additionally, the FAC explicitly describes in Paragraph 13 that Paragraphs 16-17
18 applies to Defendant Burns: "Defendant Burns and Does chose to not follow this
19 standardized administrative committee process, and rushed to place Mr. Romero with
20 convicted murderer and single-celled inmate Jaime Osuna, **despite knowing that Osuna**
21 **was a danger to anyone around him, as described in Paragraphs 16 and 17.**" (Dkt. 15
22 at 5, ll. 18-21) (emphasis added). Similarly, Paragraph 19 of the FAC states that: "As
23 described in **Paragraphs 16-17, Defendant Clark was on notice** of the particular violent
24 nature of Jaime Osuna but took no steps to ensure that Osuna remained single-celled." (Dkt.
25 15 at 8, ll. 19-21) (emphasis added).

26 Paragraph 16 sets forth *how* Defendant Burns and Defendant Clark were on notice:
27 "According to CDCR records, in 2012, a guard caught Jaime Osuna with a five-inch metal
28 shank. That same report describes Osuna has a high-risk inmate to be housed in a secured

1 single cell with no inmate contact," (Dkt. 15 at 6, ll. 15-17); "[s]hortly after the 2012
2 incident...Osuna stabbed and slashed the face of the inmate, resulting in 67 stitches," (*id.* at
3 6, ll. 20-21); "[p]rison reports from 2016 also list Osuna as high-risk staff assaultive and an
4 administrative segregated inmate." *Id.* at 6, ll. 23-24. The FAC does not just state that these
5 gory details are in CDCR files, it explicitly states that Defendant Burns and Clark were on
6 notice of these gory details, and the Osuna was "an administrative segregated inmate." *Id.*

7 Paragraph 18 emphasizes how Defendants Clark and Burns were on notice in the
8 context of explaining how the two officials made their decision to place Romero in Osuna's
9 cell: "**Despite being put on notice** that Osuna would kill again if placed in close proximity
10 to another inmate, and despite glaring evidence that Osuna was an inmate who should not
11 be housed with any other inmate, Defendant Burns and the Doe defendants who also were
12 responsible for implementing the standardized administrative committee process, as well as
13 Defendant Clark who was responsible for supervising and approving the decisions of the
14 administrative committee process, chose to ignore the known risk of Osuna and placed Luis
15 Romero in a cell with Jaime Osuna within 24 hours of Romero arriving at Corcoran jail."
16 (Dkt. 15 at 7, l. 22 -8, l. 1)

17 Thus, Plaintiff has adequately alleged that Defendants Clark and Burns had
18 knowledge of the substantial risk of serious harm to Decedent by placing him in a cell with
19 Osuna.

20 **2. The FAC alleges that Defendants Burns and Clark Failed to
21 Ensure Routine Cell Checks**

22 The Findings and Recommendations states that Plaintiff does not allege factual
23 support that Defendants Burns and Clark "failed to ensure routine cell-checks were
24 conducted or failed to enforce rules against bedsheets preventing visibility into cells." (Dkt.
25 36 at 7)

26 Paragraph 20 of the FAC alleges that Defendants Burns and Clark "failed to conduct
27 routine safety check-ups, even when a bedsheet was impermissibly draped inside the cell."
28 (Dkt. 15 at 9, ll. 6-7) Plaintiff submit that in alleging that something did not happen (safety

1 checks), she is not required to prove a negative; to allege that something was not done it
2 suffices to say Defendants did not do that thing. Yet, the FAC does indeed provide more
3 factual support. Paragraph 21 alleges: "On the evening of March 8, 2019, however,
4 defendants Clark, Burns and Does did not enforce the normal rules, despite being put on
5 notice of the danger that Osuna posed." (Dkt. 15 at 9, ll. 6-7)

6 Paragraph 21 then describes how rules were not enforced, that Burns ensured that
7 routine safety checks did not happen for at least four hours, did not order bedsheets down,
8 and making sure the guard station was empty:

9
10 Burns and Doe defendants, correctional officers at Corcoran assigned to the
11 cellblock that Romero and Osuna were housed on the evening of March 8, 2019,
12 affirmatively worked together to ensure that correctional officers did not conduct
13 any night-time safety checks. Routine safety checks are supposed to occur at least
14 every hour, and normally every twenty minutes, and a guard station is located
15 around 100 feet of the cell that held Romero and Osuna. On March 8, 2019, Does,
16 who are supervised by Burns, colluded to ensure a number of highly unusual
omissions: they never made any safety checks for at least four hours; they did not
order Osuna (or Romero) to take the bedsheets down at any point in the night; the
guard station on the cell-block was empty during this time and no correctional
officer responded to the loud noises.

17 (Dkt. 15 at 9, ll. 15-25)

18 The FAC adequately alleges that Defendants Burns made sure that what was required
19 to happen per normal procedure did not actually happen. Plaintiff does not have to describe
20 what particular words were uttered or context of each message to his subordinates. See e.g.
21 *Kramer v. Autobytel, Inc.*, 759 F.Supp.2d 1165, 1172 (N.D. Cal. 2010) (In context of allegation
22 of unlawful unsolicited commercial telemarketing via mass texts, "notice pleading standards
23 do not require a plaintiff to allege details at the pleading stage about the time and context of
24 every text message.")

25 **B. Supervisory Liability**

26 A supervisor can be held liable in his or her individual capacity under § 1983 only if
27 (1) he or she personally participated in the constitutional violation, or (2) there is a "sufficient
28

1 causal connection between the supervisor's wrongful conduct and the constitutional
2 violation." *Hansen v. Black*, 885 F.2d 642, 645-46 (9th Cir. 1989).

3 Ninth Circuit model jury instruction 9.4 "Section 1983 Claims Against Supervisory
4 Defendant in Individual Capacity – Elements and Burden of Proof" set for the elements
5 Plaintiff must establish at trial: (1) the supervisory defendant acted under color of state law;
6 (2) the [act[s]] [failure to act] of the supervisory defendant's subordinate[s] [name[s]] deprived
7 the plaintiff of [his] [her] particular rights under [the United States Constitution] as explained
8 in later instructions; 3. [the supervisory defendant directed [his] [her] subordinate[s] in the
9 [act[s]] [failure to act] that deprived the plaintiff of these rights;] or [the supervisory
10 defendant set in motion a series of acts by [his] [her] subordinate[s], or knowingly refused
11 to terminate a series of acts by [his][her] subordinate[s], that [he] [she] knew or reasonably
12 should have known would cause the subordinate[s] to deprive the plaintiff of these rights;]...
13 and 4. The supervisory defendant's conduct was so closely related to the deprivation of the
14 plaintiff's rights as to be the moving force that caused the ultimate injury."² Manual of Model
15 Civil Jury Instructions, 9.4 (2018).

16 The supervisory liability claim raised in the FAC is not just a failure to train. Paragraph
17 21 of the FAC alleges that: "Burns and Doe defendants, correctional officers at Corcoran
18 assigned to the cellblock that Romero and Osuna were housed on the evening of March 8,
19 2019, affirmatively worked together to ensure that correctional officers did not conduct any
20 night-time safety checks." (Dkt. 15 at 9, l. 15-19)

21 The FAC alleges each of these elements. The Findings and Recommendations states,
22 "Plaintiff has failed to allege factual support that either defendant had knowledge of a
23 substantial risk of serious harm to Decedent in placing him in a cell with inmate Osuna."
24 (Dkt. 36 at 9) As described above, the FAC does allege how Defendants Burns and Clark
25 had knowledge of the substantial risk of serious harm posed to Decedent were he to share
26 a cell with Osuna.

28 ² Available at: <https://www.ce9.uscourts.gov/jury-instructions/node/141>

Read together, Paragraphs 13, 15, 16, 18, 20 and 21 set forth how Burns and Clark were on notice, not just the mere fact that they were on notice. (Dkt. 15 at 3-7, 9)

C. Loss of Familial Relations

The Findings and Recommendations states, “[a]s discussed above, the FAC sets forth only conclusory allegations that Defendants Burns and Clark had knowledge of a substantial risk of serious harm to Decedent, and therefore Plaintiff’s claim for loss of familial relations fails.” (Dkt. 36 at 10) Again, Plaintiff objects to this and submits that a review of Paragraphs 13, 15, 16, 18, 20 and 21 of the FAC demonstrates how Burns and Clark were on notice, not just the mere fact that they were on notice.

D. Conspiracy Claim Will be Dismissed

Plaintiff will dismiss the Conspiracy claim.

E. Qualified Immunity

The Findings and Recommendations states, “[b]ecause the Court finds that the first prong of the qualified immunity inquiry is not satisfied, it need not reach the first.” (Dkt. 36 at 11) Plaintiff objects to the finding that the first prong has not been met. As described above in Section II.A., the FAC details the alleged constitutional violation and how Defendants Clark and Burns were on notice. If the Court were to address the second prong of the Qualified Immunity analysis, Plaintiff’s Opposition to the Motion to Dismiss details how the law is clearly established at the time of Mr. Romero’s murder. (Dkt. 18 at 9-11)

III. THE DECEASED'S FATHER IS NOT A NECESSARY PARTY AND CANNOT BE FEASIBLY JOINED

A. Under Rule 19(a), the Elder Mr. Romero is Not Necessary

Rule 19(a) provides a two-prong inquiry for determining whether a party is necessary. *White v. Univ. of Cal.*, 765 F.3d 1010, 1026 (9th Cir.2014). A party is necessary if (1) “in that person's absence, the court cannot accord complete relief among existing parties” or (2) “that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may ... impair or impede the person's ability to protect the interest; or leave an existing party subject to a substantial risk

1 of incurring double, multiple, or otherwise inconsistent obligations because of the interest.”
2 Fed. R. Civ. P. 19(a).

3 **1. First Prong: No Involvement to Merit Protection**

4 The first prong of the rule is concerned only with “relief as between the persons
5 already parties, not as between a party and the absent person whose joinder is sought.”
6 *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*,
7 662 F.2d 534, 537 (9th Cir.1981) (quoting 3A Moore's Federal Practice P 19.07-1(1), at 19-
8 128 (2d ed. 1980). The court can accord complete relief among the existing parties, Dora
9 Solares is the only heir with any connection to the decedent and thus the only heir who
10 sustained a loss, and as described below, the elder Mr. Romero would not be entitled to
11 damages under state or federal law.

12 Regarding federal claims, the FAC alleges facts that establish that Decedent's
13 absentee father did not sustain a loss for purposes of the Fourteenth Amendment. In
14 *Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1058 (9th Cir. 2018), the Ninth Circuit
15 addressed an absentee parent's ability to bring Fourteenth Amendment claims for loss of
16 companionship. Citing the Supreme Court's holding in *Lehr v. Robertson*, 463 U.S. 248
17 (1983), the Ninth Circuit outlined the limits to a biological parent's ability to bring claims
18 pursuant to the Fourteenth Amendment:

19 In the context of parent-child relationships specifically, the Supreme Court has
20 emphasized that the rights of parents are a counterpart of the responsibilities they
21 have assumed: **“the mere existence of a biological link does not merit**
22 **equivalent constitutional protection.”** *Lehr*, 463 U.S. at 261. Judicially
23 enforceable Fourteenth Amendment interests require enduring relationships
24 reflecting an assumption of parental responsibility and “stem[] from the emotional
25 attachments that derive from the intimacy of daily association, and from the role it
26 plays in promoting a way of life through the instruction of children.” Id. at 256–61;
see also *Kirkpatrick v. Cnty. of Washoe*, 843 F.3d 784, 789 (9th Cir. 2016) (discussing
the Fourteenth Amendment rights of an unwed biological father).

27 [...] 28

29 **In sum, even biological parents must maintain consistent involvement in a**
30 **child's life and participation in child-rearing activities for their relationship to**
31 **be entitled to the Fourteenth Amendment protections at issue here.**

32 *Wheeler*, 894 F.3d at 1058 (emphasis added).

1 A decedent's parents generally have the right to assert substantive due process
2 claims under the Fourteenth Amendment. *Hayes v. Cnty. San Diego*, 736 F.3d 1223, 1229-30
3 (9th Cir. 2013). The due process claim by a parent is not the pain experienced by the
4 decedent, but the loss of companionship the parent feels as a result of death; these claims
5 can be asserted even after a child reaches the age of majority. *Smith v. Fontana*, 818 F.2d
6 1411, 1419 (9th Cir. 1987) *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d
7 1037, 1040 n.1 (9th Cir. 1999).

8 In this case, the FAC alleges that the Decedent had no contact with his biological
9 father since he was three years old, and as far as is known has never entered the United
10 States. (FAC 15 at 3) The mere biological link, as the Supreme Court in *Lehr* described,
11 does not automatically merit constitutional protection, and given the lack of a relationship,
12 **the biological father would not be entitled to Fourteenth Amendment protections**
13 **for loss of familial relations if he had not familial relations with the Decedent.**

14 Regarding state claims, the biological father cannot obtain recovery if he did not
15 sustain a loss for a relationship he did not have: "Although recovery under section 377 is
16 in the form of a 'lump sum,' the amount is determined in accordance with the various heirs'
17 separate interests in the deceased's life and the loss suffered by each by reason of the death,
18 and no recovery can be had by an heir who did not sustain a loss." *Cross v. Pacific Gas &*
19 *Elec. Co.*, 60 Cal. 690, 692 (1964). Recovery in a wrongful death case is determined in
20 accordance with the various heirs' separate interests in the deceased's life and the loss
21 suffered by each by reason of the death, and no recovery can be had by an heir who did
22 not sustain a loss. *Estate of Riccomi*, 185 Cal. 458, 461 (1921).

23 **2. Second Prong: the Statute of Limitations**

24 Regarding the second prong, Defendants do not face multiple obligations because
25 the statute of limitations for Mr. Romero has run, and Mr. Romero's interest would not be
26 impeded should this case proceed.

27 The Recommendations and Findings states: "Plaintiff's arguments as to the Court's
28 lack of personal jurisdiction or the statute of limitations are unpersuasive on both the law

1 and the facts alleged. Decedent's father, if joined in this action, may consent to the Court's
2 personal jurisdiction and may allege facts demonstrating that his claims are not barred by
3 the statute of limitations." (Dkt. 36 at 14) Plaintiff objects to this recommendation and
4 argues that any hypothetical facts that the biological father could raise should not subvert
5 a statute of limitations that has already passed.

6 The federal claims brought by Dora Solares under § 1983 are survival claims brought
7 by her as the successor-in-interest, and do not require any other successor-in-interest be
8 included in the same action. To the extent that the biological father would attempt to bring
9 claims on behalf of himself (rather than as successor-in-interest) for loss of familial
10 relations, as described above, *Wheeler* and *Lehr*, would counsel against any finding that he
11 be afforded the Fourteenth Amendment protections. Simply put, two years have passed
12 and Plaintiff should not be prevented from pursuing justice on behalf of her murdered son
13 based on a hypothetical, creative argument that could be raised in the unlikely scenario that
14 Decedent's long-gone father appear before this Court.

15 Under California law, each heir has a personal and separate cause of action against
16 which the applicable statute of limitations will run. *Andersen v Barton Memorial Hospital, Inc.*,
17 166 Cal.App.3d 678, 681 (1985). As a prerequisite for money damages litigation against a
18 public entity, the California Tort Claims Act requires presentation of the claim to the entity.
19 See Cal. Gov. Code § 945.4. A government claim based on causes of action for death and
20 personal injury must be presented to the public entity within six months of the date the
21 cause of action accrued. See Cal. Gov. Code, § 911.2(a). Here, the decedent was killed in
22 March 2019, and the six months statute of limitations has long passed and only Dora
23 Solares has filed a § 910 claim and has brought a cause of action. The statute of limitations
24 has run for the senior Mr. Romero to bring a suit under state law.

25 **B. Under Rule 19(b) it is Not Feasible to Join Mr. Romero**

26 In the event the Court rules Mr. Romero is necessary, under Rule 19(b) it is not
27 feasible to join him because it has no personal jurisdiction and the case can proceed without
28 an indispensable party.

1 **1. No Personal Jurisdiction**

2 Regarding the possible joinder of an absentee, a court must first determine “whether
3 it is feasible to order that the absentee be joined.” *Peabody W. Coal Co.*, 400 F.3d at 779.
4 There are three circumstances in which joinder is not feasible under Rule 19(a): “when
5 venue is improper, when the absentee is not subject to personal jurisdiction, and when
6 joinder would destroy subject matter jurisdiction.” *Id.*; see also Fed. R. Civ. P. 19(a).

7 In this case, the absentee is not subject to personal jurisdiction. Plaintiff pleaded that
8 the reason for the father to not be joined: Dora Solares divorced him when the decedent
9 was three years old and moved to the United States while the elder Mr. Romero remained
10 in Guatemala, and “never moved to the United States and has never entered the United
11 States.” (Dkt. No. 15 at 3, l. 11-12) This Court does not have personal jurisdiction of the
12 elder Mr. Romero, as he has remained in Guatemala, has no contacts with the forum of
13 the United States. See *International Shoe Co. v. State of Wash., Office of Unemployment*
14 *Compensation and Placement*, 326 U.S. 310, 316 (1945). Defendants argue that the joinder of
15 the senior Mr. Romero will not deprive the Court of subject matter jurisdiction (Dkt. 17-1
16 at 18), but that point overlooks something more fundamental, the Court does not have
17 personal jurisdiction over the senior Mr. Romero.

18 **2. Case Can Proceed Without an Indispensable Party**

19 Defendants argue that an action by some of the heirs is not permitted by statute.
20 (Dkt. 17-1 at 18). That is incorrect. Under Rule 19(b), it is still possible “for the case to
21 proceed without the joinder of the so-called ‘necessary’ absentee[s].” *Peabody Western*, 400
22 F.3d at 779 (emphasis added). California authority makes clear that a nonjoined heir is not
23 an “indispensable party” to a wrongful death action:

24 A nonjoined heir is not an indispensable party to a wrongful death action brought
25 by other heirs. (See, e.g., *Washington v. Nelson* (1979) 100 Cal.App.3d 47, 51-52 [160
26 Cal.Rptr. 644]; *Sanders v. Fuller* (1975) 45 Cal.App.3d 994, 999-1000 [119 Cal.Rptr.
27 902], and authorities cited therein.) This would seem to make eminent sense where
28 the nonjoined heir's claim is barred by a statute of limitations. Since that heir can

1 assert no claim, the court is not precluded from distributing the proceeds of the
2 action among the heirs whose claims are not barred. (See fn. 4, ante, *Cross v. Pacific*
3 *Gas & Elec. Co.*, *supra*, 60 Cal.2d at p. 692.) Therefore, since the nonjoined heir does
4 not preclude the court from granting complete relief the nonjoined heir is not an
5 indispensable party.

6 *Andersen*, 166 Cal.App.3d at 681, fn. 5.

7 Defendants would prefer the harsh scenario that the mother who raised the
8 Decedent be prevented from bringing claims until the decades-long absent father appears
9 in this case and makes a clever but not-yet-stated argument to get around the statute of
10 limitations. These contortions are not necessary. The statute of limitations for the federal
11 and state claims are passed and the biological father would not be able to proceed even if
12 he had appeared, which he has not.

13 **IV. ADDITIONAL STATE LAW CLAIM AFTER TIMELY § 910 CLAIM**

14 Plaintiff objects to the Recommendations and Findings regarding dismissal of state
15 claims. As set forth above, the federal claims should proceed, and so should the state
16 claims. Additionally, Plaintiff calls the Court's attention to additional facts and state claims
17 that have arisen since the filing of the FAC.

18 California Penal Code § 647.9 was passed after the gruesome photos of Kobe
19 Bryant's body following his fatal helicopter crash were leaked by first responders. Section
20 647.9 prohibits a first responder from capturing images of a deceased person on an
21 electronic device for any purposes other than law enforcement. Photos of Luis Romero's
22 mutilated body were published on a social media accounts (Facebook and Instagram) and
23 the website *Sword and Scale* (www.swordandscale.com). As inmates do not have access to
24 electronic cameras, these photographs were leaked by CDCR employees who
25 impermissibly took or retrieved these photos.

26 On March 9, 2021, Plaintiff, through her counsel, submitted a § 910 Government
27 Tort Claim regarding this conduct and has six months to bring additional state claims.
28 Plaintiff intends to bring a new action, or preferably, bring a supplemental claim pursuant

1 to Fed. R. Civ. P 15(d), which permits “a party to serve a supplemental pleading setting out
2 any transaction, occurrence, or event that happened after the date of the pleading to be
3 supplemented.” Fed. R. Civ. P 15(d). Here, the conduct and the law itself came into effect
4 after the FAC was filed. Plaintiff has six months from March 9, 2021 to bring these claims.
5 (Plaintiff notes that although the Magistrate Judge would have the six-month limit
6 proscribed by § 910 not apply to the Decedent’s biological father she must assume the
7 statute of limitation applies to her own claims in this instance).

8 As the conduct is distinct from Mr. Romero’s murder, Plaintiff believes the claim
9 can be filed as a supplemental pleading. But to the extent the Court intends to dismiss the
10 FAC and give Plaintiff leave to amend, Plaintiff hereby notifies the Court of this additional
11 claim and requests that she be given leave to amend in time to bring this claim as well.
12 Plaintiff should be granted leave to amend should the Court determine any ground of the
13 motion to dismiss to be meritorious. The Ninth Circuit, “in a line of cases stretching back
14 nearly 50 years, [has] held that in dismissing for failure to state a claim under Rule 12(b)(6),
15 a district court should grant leave to amend . . . unless it determines that the pleading could
16 not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127
17 (9th Cir. 2000) (internal quotations and citations omitted). Plaintiff respectfully requests
18 that should the Court grant the motion to dismiss, its order should also grant Plaintiff leave
19 to file an amended complaint.

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1 **V. CONCLUSION**

2 For the foregoing reasons, Defendants' Rule 12(b)(6) motion should be denied, and
3 they should be ordered to answer Plaintiff's Complaint.

4 Respectfully submitted,

5 Dated: August 26, 2021

6 LAW OFFICES OF JUSTIN STERLING

7 By: /s/ *Justin Sterling*
8 Justin E. Sterling,
9 Attorneys for Plaintiff
10 DORA SOLARES

11 LAW OFFICES OF ERIN DARLING

12 By: /s/ *Erin Darling*
13 Erin Darling,
14 Attorneys for Plaintiff
15 DORA SOLARES